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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: STATES OF EMERGENCY

Written statement* submitted by South Asia Human Rights Documentation Centre, a non-governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[15 January 2002]

*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Undeclared state of emergency in India

India is awash in legislation that restricts fundamental liberties. Laws purporting to safeguard national security and public order have been employed to counter ambiguously defined threats. Applied over large swathes of the country – from the state of Jammu & Kashmir in the north to several states in the northeast as well as Andhra Pradesh in the south – these Acts contain provisions that are incompatible with the principles that form the basis of a democratic State.

Preventive detention, extraordinary powers to the police and security forces to arrest, detain, and even shoot suspects – are measures that normally follow the proclamation of a state of emergency, which, in turn, is justifiable only in the face of threats to the life of a nation. The extensive nature of these laws has ensured that virtually the entire country remains in a state of undeclared emergency.

Some of the major legislative measures are summarised below:

The Disturbed Areas Act is in effect in the states of Assam, Nagaland, Manipur, parts of Tripura, Jammu and Kashmir, Andhra Pradesh, and in two districts of the state of Arunachal Pradesh. It gives police extraordinary powers of arrest and detention.

The National Security Act (NSA) of 1980 provides for detention of a person "with a view to preventing him from acting in any manner prejudicial to" various State objectives including national security and public order. The maximum period of detention is 12 months. The Act limits the powers of the court to review detention orders. And while it requires the Government to refer all cases to an Advisory Board consisting of High Court judges within three weeks of the detention, it does not permit legal counsel to appear before the Board on behalf of the detenu. The proceedings of the Advisory Board are moreover closed to the public and its report to the Government is confidential. Finally, it gives legal immunity to any government officer acting in good faith in pursuance of the Act. At the end of 1997, according to Government records, approximately 500 persons were in detention under the NSA.

The Jammu and Kashmir Public Safety Act (PSA) of 1978 applies similar procedures to the state of Jammu and Kashmir, allowing detention without trial for two years. According to Government records, updated as far as August 1997, nearly 1,600 persons were being held in five detention centers in Jammu and Kashmir as compared to 2,070 in 1995. Of these, 1,298 persons were held under the PSA.

The Armed Forces Special Powers Act of 1958 remains in effect in Jammu and Kashmir, Nagaland, Manipur, Assam, and parts of Tripura. It gives the Central Government the power to declare any State or Union Territory a disturbed area, allows security forces to fire at any person if it is considered "necessary for maintenance of law and order." They can also arrest any person "against whom reasonable suspicion exists" with no obligation to inform the detainee of the grounds for arrest. Finally, security personnel are given immunity from prosecution for any acts committed by them in relation to the Act.

The Prevention of Terrorism Ordinance (POTO) of 2001 is the latest in the series of measures that often cause more harm than the threat they are meant to tackle. POTO provides for the holding of an accused person for a prolonged period of detention for up to 180 days without charges, and effectively subverts the cardinal principle of the criminal justice system – the presumption of innocence – by putting the burden of proof on the accused, withholding of the identity of

witnesses, making confessions made to the police officer admissible as evidence, and giving the public prosecutor the power to veto bail.

Certain rights must be fully respected at all times and under all circumstances. These include the right not to be arbitrarily deprived of life, the right to freedom from torture, the right to a fair trial and the right to protection against discrimination. The Acts listed above lack the safeguards needed to ensure the protection of these basic rights.

India is a party to the International Convention on Civil and Political Rights (ICCPR) and is therefore obliged to abide by its provisions. Furthermore, any derogation from its provisions is only permissible under three conditions. Firstly, it is only "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" that states may derogate from their obligations under the ICCPR. Also, such derogation must be "strictly required by the exigencies of the situation" and cannot be inconsistent with other international law obligations. The AFSPA, for example, was enacted without such an official proclamation of emergency and goes beyond the requirements of the situation. No official proclamation was made with regard to the application of the NSA or POTO either.

Secondly, there can be no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. The AFSPA violates three of these - Article 6 guaranteeing the right to life and prohibiting the arbitrary deprivation of life, Article 7 prohibiting torture and Article 8 prohibiting forced labour.

Certain elements contained in this Acts violate other key provisions of the ICCPR. Article 4 of POTO violates Article 14 (2) of the ICCPR which states that any person "charged with a criminal offence to be presumed innocent until proven guilty." POTO allows detention for a minimum of one year, and it is for the accused to prove his or her innocence, which is made more difficult by the courts' powers to convict a person using only the testimony of the arresting police officers.

The NSA also derogates from rights guaranteed under the ICCPR, in particular Article 9 which provides that anyone who is arrested must be informed of the reasons for the arrest and the charges against him. Under Section 8 (2) of the NSA, the authorities may not disclose the grounds on which the person has been detained. This is also in direct contravention of article 14 (3) of the Covenant.

Thirdly, under article 40 of the ICCPR, any state which derogates from the Covenant must inform the other States parties immediately, through the Secretary-General. It must also give reasons for the derogation and the date on which the derogations are terminated. India has not met this obligation with regard to any of the above legislation.

In its Concluding Observations after having considered India's Third Periodic Report in July 1997, the UN Human Rights Committee expressed its concern "at the continuing reliance on special powers under legislation such as the Armed Forces Special Powers Act, the Public Safety Act and the National Security Act in areas declared to be disturbed and at serious human rights violations, in particular with respect to Article 6,7,9 and 14 of the Covenant, committed by security and armed forces acting under these laws as well as by paramilitary and insurgent groups." The Committee also expressed regret that by applying legislation such as the AFSPA, the State party was "in effect using emergency powers without resorting to Article 4, paragraph 3, of the Covenant." It recommended the close monitoring of the application of "these emergency powers" to ensure strict compliance with the provisions of the Covenant.

The September 11 attack in New York prompted many countries to adopt anti-terrorism policies and legislation. In this context, the High Commissioner for Human Rights, Ms Mary Robinson, has pointed to the need to ensure that States conform to the standards set out in the ICCPR dealing with emergency measures. Such measures, the High Commissioner added, may be justified in principle in international law, provided they are demonstrated to be necessary and there are effective safeguards. However, she stressed, they may also require notice of derogation under the Covenant.

The need to strike a balance between personal freedoms and national security will and must remain the major concern of States while framing policies and legislation. A good yardstick by which to measure State action is the set of standards laid down in the ICCPR. India, along with other countries, must be reminded of its obligation to conform to these standards. It must also submit its actions to scrutiny. That, as the High Commissioner pointed out, is the sign of a healthy democracy.